No. 04-1442

Supreme Court, U.S.
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In The

# Supreme Court of the United States

JANET PIPPINS,

*Petitioner,*

v.

TANGIPAHOA PARISH COUNCIL
and GORDON BURGESS,

*Respondents.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Fifth Circuit**

## BRIEF IN OPPOSITION

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## ARGUMENT

Petitioner's argument concerning the summary judgment standards used by the circuit courts of appeal in "mixed motive" cases is a red herring. This is not a "mixed motive" case, and thus does not even present the issue of the proper summary judgment standard in such cases.

Furthermore, there is no split among the circuits regarding the evaluation of employment discrimination claims at the summary judgment stage. The central focus of the inquiry made by all circuits is whether the plaintiff received less favorable treatment because of a protected characteristic. The *McDonnell Douglas* approach is merely a tool provided to the lower courts to aid in their inquiry. Although all circuits may not use precisely the same terminology in framing their analysis, they all remain focused on whether the plaintiff has produced evidence to support a genuine issue of fact as to whether or not he or she was the victim of an employment decision motivated by a protected characteristic.

### I. This Is Not a "Mixed Motive" Case.

As the trial court made plain in its opinion, plaintiff produced no evidence, direct or circumstantial, that her employer considered her sex in deciding to terminate her. That court opined: "The summary judgment record is bereft of any proof that the illegitimate criterion (sex) actually motivated Burgess' decision to fire her." (Opinion of the trial court, reproduced at p. 20 of petitioner's appendix.) It is this complete and total lack of evidence – either direct or circumstantial – that caused the trial court to dismiss petitioner's suit. In light of this lack of evidence of discriminatory motive, the Fifth Circuit affirmed the

trial court's decision in an unpublished opinion (which has no precedential value). *See* footnote 1 of the Fifth Circuit's opinion, reproduced in petitioner's appendix at p. 2. It stands to reason that the Fifth Circuit's opinion does not contain an extensive discussion of the proper summary judgment standard in "mixed motive" cases, for the simple reason that petitioner produced no evidence that a discriminatory motive played any part in her termination.

## II. The Central Focus of the Inquiry Made by All Circuit Courts at the Summary Judgment Stage of Employment Discrimination Cases Is Whether the Plaintiff was Treated Less Favorably because of Protected Characteristics.

This Court has created an evidentiary burden-shifting framework to aid courts in their evaluation of employment discrimination claims at the summary judgment stage. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). This approach is not intended to be a rigid framework applicable to all cases. *Id.* at 802. Under the *McDonnell Douglas* approach the plaintiff must (1) establish a *prima facie* case, (2) the defendant is then called upon to articulate a legitimate reason for its action, and (3) the plaintiff can then succeed in his claim only if he proves that the defendant's proffered reason is merely a pretext. The central focus is "always whether the employer is treating some people less favorably than others because of their race, color, religion, sex, or national origin." *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978), citations and internal quotations omitted.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) the issue before the

Court was whether the plaintiff could be successful following a trial on the merits if she had proved a "mixed motive" – *i.e.*, that although the employer had a legitimate reason for its actions, a protected characteristic was also an additional motivating factor in the employer's decision. Thereafter, some circuit courts required direct evidence for a plaintiff to succeed under the *Price Waterhouse* "mixed motive" analysis. However, in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), the Court held that the plaintiff in a "mixed motive" case was not required to produce direct evidence of a discriminatory motive in order to have the jury receive a "mixed motive" instruction. Thus, under *Desert Palace,* the plaintiff is not limited to direct evidence when trying to succeed in a "mixed motive" case. Nevertheless, *Desert Palace* did not change the requirement that the plaintiff must provide *some* evidence of discrimination, even if it is indirect or circumstantial evidence.

Even had this case presented a "mixed motive" analysis, there is no true split in the circuits in how such cases are analyzed by the courts. The opinion of the Fifth Circuit in the case *sub judice* does not articulate any "mixed motive" analysis and is furthermore unpublished, and therefore of no precedential value. The published opinions of the Fifth Circuit concerning summary judgment in "mixed motive" cases are not inconsistent with the opinions of the other circuits.

In *Mereish v. Walker*, 359 F.3d 330, 334-39 (4th Cir. 2004) the court framed its analysis in terms of the *McDonnell Douglas* approach. The court held the plaintiff's evidence that the defendant's proffered legitimate basis for its actions was merely a pretext was wholly insufficient to raise a genuine issue of material fact.

*Mereish*, 359 F.3d at 399. Furthermore, the court held that the record demonstrated that the defendant's decision was solely motivated by its proffered legitimate reason. *Id.* at 340. The court stated, "There is simply no evidence – direct or circumstantial – upon which a jury could reasonably conclude that age was a motivating factor in [the defendant's] decision to terminate [the plaintiff]." *Id.* Therefore, the central focus in *Mereish* was whether the employer was treating some people less favorably than others because of a protected characteristic.

In *EEOC v. Warfield-Rohr Casket Comp., Inc.*, 364 F.3d 160 (4th Cir. 2004) the court reviewed a lower court's decision to grant summary judgment to the defendant of an employment discrimination claim. Although, the court describes pretext and mixed motive cases as alternative methods of proof, the court held the evidence did not conclusively show that the defendant would have terminated the plaintiff if his age had not been considered. *Id.* at 163, 165. The court's central focus was whether the plaintiff was treated less favorably than others because of his age. *Id.* 163-65. The court reversed summary judgment in favor of the defendant because evidence existed such that a reasonable jury could find a protected characteristic was a motivating factor in the defendant's actions. *Id.* at 165.

*Parks v. Rumsfeld*, 119 Fed.Appx. 382, 2005 WL 19465 (3rd Cir. 2005), cited by the petitioner, is an unpublished opinion, not considered precedential by the Third Circuit.[1]

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[1] Internal Operating Procedure Rules of the Third Circuit provides there are two forms of opinions: precedential and not precedential. I.O.P. Rule 5.1 (3rd Cir.). The face of the opinion states whether it is

(Continued on following page)

However, the precedential effect of *Parks* is not relevant because it does not support the petitioner's argument that a circuit split exists. In *Parks*, the Third Circuit frames its analysis in terms of the *McDonnell Douglas* approach. The court assumes *arguendo* that the plaintiff can establish a *prima facie* case and that the defendant can proffer a legitimate basis for its action. *Id.* at 4. The court held that there was simply not enough evidence provided by the plaintiff to provide a basis for an inference of discrimination. *Id.* at 8. Thus, there can be no basis to support a finding that the defendant's proffered reason is a pretext or that a protected characteristic was a motivating factor in the defendant's decision.

The Fifth Circuit's analysis in *Rachid v. Jack in the Box*, 376 F.3d 305 (5th Cir. 2004) is also framed in terms of the *McDonnell Douglas*, however the existence of a *prima facie* case was at issue. The petitioner in the case at bar now argues that *Rachid* means, "Even if the plaintiff has strong circumstantial evidence that would prove discrimination was a motivating factor, the case will end on summary judgment if the plaintiff cannot prove a *prima facie* case." (Petition for Writ of Certiorari, p. 8) Although not clearly articulated, it seems the petitioner intends to argue that rigid requirements exist to establishing a *prima facie* case in an employment discrimination case under the *McDonnell Douglas* approach. It is true that in *Rachid* the court outlined four elements a plaintiff must show in order to establish a *prima facie* case, and the plaintiff had not definitively established those elements. *Id.* at 309, 313. However, the plaintiff's case did ***not*** end

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precedential or not precedential. *Id. Parks v. Rumsfeld*, 119 Fed.Appx. 382, 2005 WL 19465 (3rd 2005) states that it is "Not Precedential."

because these four elements were not established. *Id.* To the contrary, the court expressly held that a *prima facie* case can be established with other evidence. *Id.* at 313. The court's holding that the plaintiff established a *prima facie* case was in fact based circumstantial evidence, namely comments the defendant made about the plaintiff's age in the past. *Id.* Therefore, there is no merit in petitioner's argument that the *McDonnell Douglas* approach could prematurely end a plaintiff's case if it is based only on circumstantial evidence. Thus, the court's central focus remained whether the plaintiff received less favorable treatment because he was a member of a protected class.

In *Hall v. Babb*, 389 F.3d 758 (7th Cir. 2004) the issue before the court was whether the evidence existed to support the plaintiff's claim that a protected characteristic was a motivating factor in its selections for promotions. *Id.* at 765. The court held that no evidence existed to create a material dispute as to whether a protected characteristic was a motivating factor and therefore affirmed summary judgment in favor of the defendant. *Id.*

In *Hall v. Alabama Association of School Boards*, 326 F.3d 1157 (11th Cir. 2003) the court framed its analysis of the lower court's post-trial decision in favor of the defendant in terms of the *McDonnell Douglas* approach. The court noted the determination that a proffered legitimate basis for the defendant's action is a pretext aids in making the determination of what were the motivating factors. *Hall*, 326 F.3d at 1167. The court held that the *McDonnell Douglas* approach is not a "substitute for reaching the ultimate issue of whether the employee has, in fact, been a victim of discrimination." *Hall*, 326 F.3d 1167 (internal

quotations and citations omitted). Furthermore, the court reached the ultimate question and concluded that it could not find that race had been a motivating factor in the defendant's decision. *Id.* at 1169.

In addition to the cases cited by the petitioner the Eighth Circuit has also dealt with the effect of *Desert Palace* on the *McDonnell Douglas* approach. *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011 (8th Cir. 2005). The court defined the term "pretext" within the third step of the *McDonnell Douglas* approach to mean the defendant's proffered reason is a "pretext *for unlawful discrimination*, not merely false in some way." *Strate*, 398 F.3d at 1017 (emphasis contained in original text). The court held that at the summary judgment stage the controlling issue ordinarily is "whether or not there exist a genuine issue of fact regarding *any* discriminatory motive." *Id.* (emphasis contained in original text). Furthermore, the focus of its inquiry at summary judgment stage "always remains on the ultimate question of law: whether the evidence is sufficient to create a genuine issue of fact as to whether the employer intentionally discriminated against the plaintiff because of [the protected characteristic]." *Id.* at 1018 *quoting*, *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996). The court held that *Desert Palace* affirmed its application of the *McDonnell Douglas* approach allowing a plaintiff to survive summary judgment where the evidence, direct or circumstantial, establishes a genuine issue of fact regarding an unlawful motivation for an employment action based on a protected characteristic, even though the plaintiff may not be able to create genuine doubt as to the truthfulness of a different, yet lawful, motivation. *Strate*, 398 F.3d at 1018.

The common thread in all of these cases is that an employee cannot succeed in a discrimination case if he has no evidence – either direct or circumstantial – that the employer's decision was based in part on a discriminatory motive. The circuit courts are all consistent in applying this core principle and, thus, there is no split in the circuits.

## CONCLUSION

Petitioner's case is not a "mixed motive" case because she produced no evidence, direct or circumstantial, that would tend to show that her sex motivated her employer's decision in any way.

Furthermore, there is no split among the circuits regarding the evaluation of "mixed motive" employment discrimination claims at the summary judgment stage. The *McDonnell Douglas* approach is merely a tool provided to the lower courts to aid in their inquiry. The central focus of the inquiry made by all the circuits is whether the plaintiff received less favorable treatment because of a protected characteristic. The petitioner cites *Mereish*, *Warfield-Rohr*, *Parks*, *Rachid*, *Babb*, and *Alabama Association of School Boards* as evidence of a split among the circuits. However, after careful review of these cases it is clear that, although all the circuits may not use precisely the same terminology in framing their analysis, they all focus on the core issue of whether the plaintiff has produced evidence to support a genuine issue of fact as to whether or not he or she was the victim of an employment

decision motivated by a protected characteristic. Therefore, no need exists for the Court to grant *certiorari* in this case.

Respectfully submitted,

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